Senator Runner's Week in Review

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California Business Climate After Proposition 64

Overview

Many California businesses have been plagued with excessive and hyper-technical litigation by some irresponsible consumer attorneys. This has been cited as one of the primary reasons for California's poor business climate and has been identified as a factor in limited job development, increased housing costs, and business relocations.

California's Unfair Competition Law ("UCL"), which permits lawsuits to be brought against businesses for mere technical violations of a statute without proof of harm to a plaintiff or the public, has been cited as one of the most onerous sources of needless, expensive litigation. Irresponsible lawyers victimize small businesses with unnecessary lawsuits that have been characterized as "shakedown" lawsuits because of the willingness of some plaintiffs' attorneys to quickly drop litigation for cash settlements.

In response to the abuses, California businesses and consumer groups supported Proposition 64 in 2004. That ballot measure had five main provisions, which: 1) Required an attorney who files a lawsuit to have an actual client who has been harmed or suffered financial injury; 2) Protected the right of a consumer to sue someone, if the consumer is harmed or has suffered damages; 3) Allowed only public officials (the Attorney General, district attorneys, and some city attorneys) to file lawsuits on behalf of the "general public"; 4) Dedicated more funding to official public litigation of serious consumer claims; and 5) Required lawyers who want to represent big groups or the public at large to go to court as they do in every other state and certify a class of plaintiffs for litigation against a defendant.

Voters passed Proposition 64 by a wide margin. This measure made an incremental improvement in California's litigation atmosphere. Reports indicate that litigants and courts are applying Proposition 64 correctly. Four of the five Courts of Appeals, which have ruled on the applicability of Proposition 64 to pre-existing lawsuits have upheld its application. The one Court of Appeals that did not agree with the retroactive application of Proposition 64 was in San Francisco.

Although the voters understand the problem of excess litigation and supported this partial remedy, the courts do not seem to be of the same mind as the voters. One noteworthy case, Graham v. DaimlerChrysler, highlights the disconnect between the voters and the courts.

News of the Week

Graham v. DaimlerChrysler

In December, the California Supreme Court decided Graham v. DaimlerChrysler. The case arose when Daimler mistakenly represented that some of its 1998 and 1999 pick up trucks could tow up to 6,400 pounds. However, those trucks could only tow 2,000 pounds without modification. Before a lawsuit was filed, Daimler informed buyers of the mistake, warned them not to tow more than 2,000 pounds, and distributed corrected marketing information, manuals, and other materials. The company also offered refunds to truck owners who purchased modifying parts and equipment. In some cases, Daimler offered to repurchase the truck from the buyer.

The Santa Cruz District attorney and the California Attorney General Bill Lockyer threatened legal action, but requested additional information from the company before proceeding. Plaintiff Graham filed the lawsuit against Daimler before it could respond to the public officials who had requested the information. In the end, Daimler offered to replace or repurchase the trucks from all of the buyers. Consequently, the trial court dismissed the complaint as moot because Daimler had provided the truck owners all relief the plaintiffs had sought. At this point this case may appear to be unworthy of note except as one where the courts protected a business that had corrected its own mistakes.

The plaintiff's attorneys filed for attorneys' fees under the private attorney general statute on the basis that they had provided a benefit to the public. How had they done such a thing? A judge had dismissed their case because the defendant had done what the lawsuit was requesting as relief. The complaint was of no force. They had won nothing. Plaintiff's attorneys argued that they were the "catalyst" to cause Daimler to make the corrections. In most American jurisdictions that theory would remain just that, a legal theory. In California, it means that the plaintiff's attorneys were able to argue successfully that they should receive in excess of $700,000 in fees. The preponderance of the fees was for time spent litigating the fees' issue not for filing the seven-page complaint or for arguing the motion to dismiss. The primary question that arises from this case is how could the California Supreme Court believe the work of these attorneys justified requiring the defendants to pay their fees.

According to the majority opinion of the court, lawyers need incentives to bring lawsuits that generate beneficial changes but often produce little or no damages. The fees should be paid even in cases that never go to court or result in formal settlements. The court's opinion took that idea to an absurd end. Not only did they permit recovery of attorney fees without a court resolution of the case in the plaintiffs' favor but they also allowed the hours expended to be multiplied. Worse yet, the court actively encouraged paying attorneys' fees for the hours expended litigating over the attorneys' fees issues. Those were the great majority of the hours put in by Graham's attorneys. In this case the court rewarded attorneys for filing a complaint that was dismissed because the defendant took corrective action after the complaint had been served.

Justice Chin joined by two other justices dissented avidly. He criticized the court for stating that the catalyst theory had been endorsed previously by them. On the contrary, the court had expressly not recognized the catalyst theory. In prior cases the court had denied the attorneys their fees on a catalyst theory. The court's opinion allows fees to be awarded when the defendant takes voluntary action. How can it be determined that the plaintiff's attorneys had been the reason why the defendant had corrected the situation? Here the lawsuit is a coincidence but is not enough to justify an award of attorneys' fees.

The private attorney general doctrine has a risk and a cost, which must be balanced. They are balanced when a court decides the case and awards a judgment against the defendant. This is the requirement imposed by the private attorney general statute. The Code of Civil Procedure authorizes awards of fees to private attorneys general when a party is successful. Here the plaintiff's case had been dismissed.

There was no need for a private attorney general to act at all in the matter of the DaimlerChrysler marketing of the pickup trucks. The Santa Cruz District Attorney and the California Attorney General were already acting in this matter when the plaintiff filed the complaint. The plaintiffs' lawsuit was a tagalong action. Worse yet, the court granted fees for the time the plaintiffs attorney spent litigating their own attorneys' fees.

Justice Chin observes tellingly, "If, as the majority claims, the private attorney general doctrine is intended to encourage societally useful lawsuits (like the majority finds this one to be), and not merely to swell attorneys' coffers, permitting fees for work expended on the actual lawsuit plus a multiplier, and permitting attorneys to be paid for their efforts in obtaining those fees plus that multiplier, is a sufficient incentive. A multiplier on fees generated litigating fees, which, as here, can make the overall reward truly absurd compared to the effort regarding the underlying litigation, is not necessary."

A Step Backward

Allowing the multiplier for litigating fees stacks the deck in favor of plaintiffs and their attorneys. A defendant must take into account its own liability and attorneys' fees in considering how it responds to litigation. In addition, a defendant business now faces a real risk of being required to pay plaintiff's attorneys' fees and even attorneys' fees for challenging those fees. The Graham opinion is a step backward for reasonable litigation in California. In this opinion, the California Supreme Court granted an opportunity for the plaintiff's lawyers to obtain in excess of $700,000 in fees for filing a seven-page complaint that contained largely boilerplate language. Permitting the catalyst theory to be applied for granting the fees can only lead to more unnecessary tagalong cases and litigation over the fees claimed for bringing such cases.

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